Stanley E. Stein, Receiver for Holiday Inn Coliseum[1] *and* Hotel & Restaurant Employees & Bartenders Local 118, Petitioner. Case 8–RC–14103

October 31, 1990

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Christine Hoffer on June 9, 1989. On June 20, 1989, the Regional Director for Region 8 issued a Decision and Direction of Election in which he asserted jurisdiction over Holiday Inn Coliseum (the Hotel). On June 30, 1989, Stanley E. Stein, Receiver for Holiday Inn Coliseum (the Employer) filed a Request for Review of the Decision and Direction of Election.[2] The Region, treating the request as a motion for reconsideration, held a second hearing on August 16, 1989, for the purpose of taking further evidence.[3] On October 23, 1989, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, the Regional Director for Region 8 transferred this proceeding to the Board to determine whether to assert jurisdiction over the Employer. The Employer and the Petitioner filed posthearing briefs with the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board finds that the Employer is not exempt from the Board's jurisdiction.

The parties do not contest the fact that Stein was appointed receiver to ''take possession of, manage, control and protect'' the Hotel. It is well settled that a receiver is a ''person'' within the meaning of Section 2(1) of the Act; and Section 2(2) of the Act includes ''any person acting as an agent of an employer'' in the definition of ''employer.'' See, e.g., *Airport Limousine Service*, 231 NLRB 932 (1977). Therefore, Stein, as receiver, is an employer within the meaning of the Act.[4]

The Employer contends that the Board should not exercise jurisdiction over it because of its close ties to an exempt government entity. We find that it would effectuate the purposes and policies of the Act to assert jurisdiction over the Employer.

In *Res-Care, Inc.*,[5] the Board reaffirmed the basic twofold inquiry enunciated in *National Transportation Service*[6] for determining when to assert jurisdiction over an employer providing services to or for an exempt entity. Further, the Board stated that it would examine not only the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer is capable of engaging in meaningful collective bargaining.

In *ARA Services*,[7] the Board summarized the essentials of the *Res-Care* analysis as follows:

> The Board concluded in *Res-Care* that it was the exempt entity (the Department of Labor) that, in every sense, retained the ultimate discretion for setting wage and benefit levels; thus, the exempt entity effectively precluded the employer from engaging in collective bargaining. Although the employer initially set the wage and benefit levels for each job classification in its operating budget, the Board noted that the budget required approval by the exempt entity and, once approved, became the basis for the contract price. In addition, the employer was required to obtain approval from the exempt entity of the wage ranges to be paid to the employer's employees, including a maximum for each classification, and the substantive terms of several employee benefits. The contract specifically provided that any proposed changes in the approved wage ranges or fringe benefit plans had to be submitted to the exempt entity for approval, along with any proposed changes in the staff man-

[1] We are amending the caption to add Stanley E. Stein, Receiver. Stein was appointed receiver on May 25, 1988, by an order of the Summit County, Ohio Court of Common Pleas pursuant to a foreclosure action against the Holiday Inn Coliseum.

[2] We adopt the findings in the June 20, 1989 Decision and Direction of Election which the Board was not requested to review.

[3] In view of our decision to assert jurisdiction, we find it unnecessary to address the Petitioner's objections to holding a second hearing and to the hearing officer's rulings at the second hearing.

[4] The Employer states summarily, without citation, that it is exempt from the jurisdiction of the Act as a political subdivision of a State. An employer will be found to be a political subdivision if it is either ''created directly by the state, so as to constitute a department or administrative arm of the government'' or ''administered by individuals who are responsible to public officials or to the general electorate.'' *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971).

Stein does not argue, and we do not find, that the Hotel meets the first prong of the *Hawkins* test. Further, where the State has a temporary interest in the employing entity, for reasons unrelated to the actual services provided by that employer and unrelated to any state interest in regulating the manner in which the employer's services are provided, we find the situation most closely analogous to bankruptcy trustees, over whom we do assert jurisdiction. See, e.g., *Karsh's Bakery*, 273 NLRB 1131 (1984). Given the temporary nature of the State's interest and the limited nature of its interest in preserving the value of a disputed asset, we find that the receiver is not a political subdivision as defined under the second prong of the *Hawkins* test. Accordingly, we find the Employer is not exempt from Board jurisdiction on this basis.

[5] 280 NLRB 670 (1986). Chairman Stephens, who dissented from the Board's refusal to assert jurisdiction in *Res-Care*, adheres to that dissenting position; but he agrees that the assertion of jurisdiction here is also proper under the opinion of the *Res-Care* majority.

[6] 240 NLRB 565 (1979). In *National Transportation Service*, the Board majority stated that the inquiry is ''whether the employer itself meets the definition of 'employer' in Section 2(2) of the Act and, if so . . . whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.'' Ibid.

[7] 283 NLRB 602, 603 (1987).

ning table, labor grade schedule, or salary schedule.

In the instant case, the Employer is a state court receiver for a Hotel property that is the subject of a foreclosure proceeding. Stein argues he is only allowed to operate the Hotel as specified by the state court, i.e., that the state court operates the Hotel through him. We reject this argument.

Stein files monthly financial reports with the judge presiding over the foreclosure case. Stein's reports, however, contain, inter alia, information on expenditures already paid out. There is no evidence that Stein needs prior approval to make expenditures for the daily operation of the Hotel; nor is there evidence that any of his expenditures ever have been questioned.

Stein has delegated the management of the Hotel to a manager and a general manager. Stein hired the general manager from outside the Hotel operation and promoted the manager from within. Stein did not seek court approval for these actions. The manager and general manager operate the Hotel on a daily basis and oversee labor relations. They have the authority to hire, fire, and discipline employees; grant wage raises to individual employees; and change company policies. Stein testified that he did not believe disgruntled employees had the right to appeal the manager's decisions to him.

We find under these circumstances that the exempt entity does not exercise such control over the Employer's labor relations policies as would remove the Employer's control over decisions affecting the ''core group of 'basic bargaining subjects,''' and thereby prohibit meaningful bargaining.[8] *Res-Care*, supra at 674. Further, unlike the situation in *Res-Care*, there are no line-by-line budgetary controls imposed on the Employer by the state court. In fact, the only budgetary control seems to be a prohibition from making major capital improvements without court approval. The only restraint on increases in wages and/or benefits, as in most settings, is the profitability of the Hotel operation and Stein's willingness to agree to such increases. Further, the Hotel managers have exclusive control over the hiring, firing, promotion, and disciplinary policies at the Hotel.

Based on the above, we find that the limitations imposed by the state court do not substantially affect the Employer's ultimate discretion over wages and benefit levels.[9] We therefore conclude that the Employer retains substantial control over all economic matters which are central to the employer-employee relationship, which enables it to engage in meaningful collective bargaining, and that it will effectuate the purposes of the Act to assert jurisdiction.

Accordingly, we shall direct an election in the following appropriate unit:

> All food and beverage employees, kitchen and dining room employees, and banquet employees, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act and all other employees.

[Direction of Election omitted from publication.]

[8] The Employer argues that the duration of his term as receiver is uncertain, and that he is not authorized to sign contracts which would bind the Hotel beyond the term of his receivership. He concludes from this that he is unable to sign a long-term labor agreement with a union. Stein's execution of such a contract, however, would bind only himself as the Employer, not future owners of the Hotel. It is not uncommon for collective-bargaining agreements to cease operating because of some change in the identity of the employer. We will not find that Stein is unable to enter into a labor contract because of the uncertainty of the duration of his receivership. See *Rancho Los Coyotes Country Club*, 170 NLRB 1773, 1774 (1968).

[9] *Long Stretch Youth Home*, 280 NLRB 678, 682 (1986) (then Member Stephens concurring).